party resisting arbitration speculated there was a possibility she could be required to incur prohibitive costs if she pursued arbitration. *Id. at 90.* The Court noted there was no evidence in the record to demonstrate the amount of fees and costs that might be imposed and rejected mere speculation about a potential outcome as a legitimate basis to avoid arbitration:

> The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement. To invalidate the agreement on that basis would undermine the 'liberal federal policy favoring arbitration agreements.'

Id. at 91.[4]

Importantly, the Court squarely placed the burden on the party resisting arbitration to produce sufficient evidence to support the asserted basis for avoiding arbitration. Unsupported speculation about a potential scenario and resulting outcome was rejected as insufficient to defeat an arbitration obligation. Similar to *Green Tree*, there was no evidence whatsoever in the record before the Sixth Circuit to support its conjecture about arbitral bias under the EDSI system. Accordingly, *Green Tree* requires reversal of the

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[4] This Court has repeatedly emphasized that mere speculation about the potential behavior of an arbitrator is not a basis to refuse to compel arbitration. *See Pacific Health Systems, Inc. v. Book*, 538 U.S. 401, 406 (2003); *Vimar Seguros Y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995).

Sixth Circuit's decision in this matter based on nothing more than unfounded suspicion and speculation.

CONCLUSION

Based on the foregoing, EDSI respectfully requests that this Court grant Ryan's petition for writ of certiorari and reverse the Sixth Circuit's erroneous decision in this matter.

Respectfully submitted,

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HILL
OCT 26 2005

No. 04-1672

IN THE

Supreme Court of the United States

RYAN'S FAMILY STEAK HOUSES, INC.,

Petitioner,

v.

ERRIC WALKER, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; STEVE RICKETTS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, AND VICKIE ATCHLEY, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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October 2005

QUESTION PRESENTED

Whether the Sixth Circuit's application of settled state-law principles to find the arbitration agreements in this case unenforceable warrants review by this Court.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

REASONS FOR DENYING THE WRIT 2

I. The Arbitration Clause at Issue Is Not Subject to the FAA 2

II. The Question Whether a Waiver of the Right to a Jury Trial Through Agreement to an Arbitration Clause Must Be "Knowing and Voluntary" Does Not Merit Review in This Case. 4

III. The Court of Appeals' Application of State-Law Contract Principles Does Not Reflect "Hostility" to Arbitration or Otherwise Present Any Issue Meriting This Court's Attention. 7

IV. The Court of Appeals' Choice of Law Analysis Is Correct and Does Not Reflect a Conflict Among the Circuits on Any Issue of Federal Law. 11

V. The Court of Appeals' Holding That Ryan's Structurally Flawed Arbitration System Is Unenforceable Presents No Issue Meriting Review by This Court 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Cases:

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) 7

American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995) 13

Arcadia, Ohio v. Ohio Power Co., 498 U.S. 73 (1990) 4

Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956) 3

Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948) 10

Caterpillar, Inc. v. Lewis, 519 U.S. 61 (1996) 4

Cooper v. MRM Investment Co., 367 F.3d 493 (6th Cir. 2004) 9, 11

Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996) 8, 10

F.D. Import & Export Corp. v. M/V REEFER SUN, 248 F. Supp. 2d 240 (S.D.N.Y. 2002) 3

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 7

Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306 (6th Cir. 2000), *cert. denied*, 531 U.S. 1072 (2001) 10

Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126 (7th Cir. 1997) 6

Hataway v. McKinley, 830 S.W.2d 53 (Tenn. 1992) 12

Hooters of America, Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999) 6, 16, 17

Howell v. Rivergate Toyota, Inc., 2005 WL 1736582 (6th Cir. July 25, 2005) 11

Hudson v. Ryan's Family Steak Houses, Inc., 212 F.3d 601 (11th Cir. 2000) (table) 14

Koveleskie v. SBC Capital Mkts., Inc., 167 F.3d 361 (7th Cir. 1999), *cert. denied*, 528 U.S. 811 (1999) 9

Lyster v. Ryan's Family Steak Houses, Inc., 239 F.3d 943 (8th Cir. 2001) 14

McMullen v. Meijer, Inc., 355 F.3d 485 (6th Cir. 2004) 16

Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (6th Cir. 2003) (en banc) 8, 11

Oblix, Inc. v. Winiecki, 374 F.3d 488 (7th Cir. 2004) 9

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) 6

Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997) 5

Penn v. Ryan's Family Steak Houses, Inc., 269 F.3d 753 (7th Cir. 2001) 9, 10, 17

Pennington v. Frisch's Restaurants, Inc., 2005 WL 1432759 (6th Cir. June 17, 2005) 11

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) 8

Philips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 12, 13

Prudential Ins. Co. of America v. Lai, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (199[illegible] 6

Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1 (1st Cir. 1999).....6

Scovill v. WSYX/ABC, __ F.3d __, 2005 WL 2454626 (6th Cir. Oct. 6, 2005).....11

Seus v. John Nuveen & Co., Inc., 146 F.3d 175 (3d Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999).....5

Smith v. West Virginia ex rel. Saylor, No. 05-205 (*cert. denied*, October 11, 2005).....1

Southland Corp. v. Keating, 465 U.S. 1 (1984).....7

United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc., 508 U.S. 439 (1993).....4

Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370 (6th Cir. 2005) ..... *passim*

Wayland v. Peters, 1997 WL 776338 (Tenn. App. Dec. 17, 1997).....12

Statutes & Rules:

Federal Arbitration Act:

Section 2, 9 U.S.C. § 2..... *passim*

Section 3, 9 U.S.C. § 3.....3

Section 4, 9 U.S.C. § 4.....3

Section 10(a)(2), 9 U.S.C. § 10(a)(2).....16

S. Ct. R. 10(a) 14

INTRODUCTION

The petition for certiorari filed by Ryan's Family Steak Houses ("Ryan's") is a grab-bag of complaints about the Sixth Circuit's fact-bound, state-law-based determination that an arbitration clause purportedly agreed to by its employees is unenforceable. The heart of the petition is Ryan's complaint that the Sixth Circuit supposedly evinced "hostility to arbitration" by subjecting the arbitration clause to "extraordinary scrutiny in a search for grounds upon which to declare [it] unenforceable." Pet. at i (question presented No. 2). Only days ago, this Court denied another petition for certiorari filed by Ryan's that made precisely the same complaint about the West Virginia Supreme Court's holding that the same arbitration clause was unenforceable under West Virginia law. *See Smith v. West Virginia ex rel. Saylor*, No. 05-205 (*cert. denied*, October 11, 2005). Ryan's petition in this case should meet the same fate as its petition in *Smith*, for a number of reasons.

First, Ryan's premises its argument on the notion that Section 2 of the Federal Arbitration Act (9 U.S.C. § 2) applies to the supposed arbitration agreement in this case, but Section 2 does not apply because the arbitration clause is not a "written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration *a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof* ...." (Emphasis added). Here, the "controversy" is between Ryan's and its employees, but the arbitration clause is in a supposed contract between the employees and a *third-party arbitration service*. The controversy in no way arises out of that contract.

Second, although Ryan's claims that there is a conflict among the circuits over whether a waiver of the right to a jury trial via an arbitration clause must be "knowing and voluntary," the claimed conflict is illusory and, in any event, the issue is not dispositive. The Sixth Circuit based its decision on a number of fact-specific alternative grounds, including

the finding that the contract lacked consideration, that no contract was ever formed because there was no mutual assent, and that the arbitration clause was unenforceable because it failed to permit effective vindication of Ryan's employees' statutory rights. Those alternative holdings render the waiver issue academic.

Third, beyond the waiver issue, Ryan's petition rests primarily on its pejorative characterization of the Sixth Circuit's application of settled state-law (and choice of law) principles to highly idiosyncratic facts. That the Sixth Circuit held an arbitration clause unenforceable does not mean that it has adopted a principle of "hostility" to arbitration that places it in conflict with the holdings of this Court or the decisions of other circuits. Rather, the decision below reflects only that the application of state-law contract principles to an arbitration agreement will sometimes — as in the extreme circumstances here — render the agreement unenforceable. Absent a real conflict among the circuits on an issue of federal law, there is no need for this Court to review such a decision.

REASONS FOR DENYING THE WRIT

I. The Arbitration Clause at Issue Is Not Subject to the FAA.

The underlying premise of all of Ryan's arguments is that the arbitration clause at issue is subject to Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, which provides for the enforceability of certain types of arbitration agreements subject to generally applicable state contract law defenses. *See* Pet. 1. The unusual agreements in this case, however, fall outside the scope of Section 2.

As Ryan's admits, the arbitration agreements here are not contained in contracts between it and its employees. Instead, "[t]he agreement to arbitrate ... is between the individual Ryan's employee and Ryan's third-party provider of alternative dispute resolution services, Employment Dispute Services, Inc. ('EDSI')." Pet. 2; *see also Walker v. Ryan's Fam-*

ily Steak Houses, Inc., 400 F.3d 370, 374 (6th Cir. 2005) ("Unlike the typical pre-employment arbitration agreement which involves a contract between the applicant and his or her potential employer, Ryan's Arbitration Agreement is not between the applicant and Ryan's. Rather, it is between the applicant and [EDSI]. EDSI is a South Carolina corporation whose sole business is the marketing and administration of the Employment Dispute Resolution Program."). The employment agreements between Ryan's and its employees do not themselves contain provisions obligating either party to arbitrate. Ryan's has entered into a separate agreement with EDSI to arbitrate disputes with its employees. *Id.* at 375.

Section 2 of the FAA provides only that two types of arbitration agreements are enforceable (subject to ordinary state-law contract defenses): (1) *pre-dispute* agreements that are included in "a contract evidencing a transaction involving commerce" and that apply to "a controversy thereafter arising out of such contract or transaction," 9 U.S.C. § 2; (2) *post-dispute* agreements to arbitrate "an existing controversy" arising out of a contract or transaction involving commerce. *Id.*

The agreements in this case are not post-dispute agreements, so they are subject to the FAA only if they constitute enforceable pre-dispute agreements under Section 2. As the plain language of Section 2 indicates, "[t]o establish a valid arbitration agreement under the FAA, there must be evidence of a written provision in a maritime transaction or commercial contract providing that controversies *arising from the contract or transaction* are subject to arbitration." *F.D. Import & Export Corp. v. M/V REEFER SUN*, 248 F. Supp. 2d 240, 246 (S.D.N.Y. 2002) (emphasis added).[1]

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[1] Sections 3 and 4 of the FAA, 9 U.S.C. §§ 3-4, moreover, apply only to agreements within the scope of Section 2. *See Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 201-02 (1956).

Here, the underlying "controversy" is between Ryan's and its employees over Ryan's failure to comply with the Fair Labor Standards Act's minimum wage and overtime requirements. That controversy arises out of the employees' relationship with Ryan's, not out of their purported arbitration contracts with EDSI. Thus, to the extent the employees' contracts with EDSI purport to require them to arbitrate their controversy with Ryan's, those contracts are not within the scope of Section 2 of the FAA, because the "controversy" is not one "arising out of such contract or transaction" — *i.e.*, the contract or transaction between the employees and EDSI.

Although the Sixth Circuit in this case appears to have assumed that the FAA applies to the arbitration clause at issue (*see Walker*, 400 F.3d at 376-77), this Court should not take up a case concerning the effect of the FAA in circumstances where it is apparent that the Act does not apply. Indeed, this Court could not ignore the question of Section 2's inapplicability to the arbitration agreements at issue, because that question of the scope of the statute is "antecedent" to all of the questions presented by Ryan's. *See Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 77 (1990); *see also Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996) (addressing statutory question that was "'predicate to an intelligent resolution' of the question presented."); *cf. United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 447 (1993) (holding that a court should address whether a statute exists before considering what it means, even if the parties do not raise the issue).

II. The Question Whether a Waiver of the Right to a Jury Trial Through Agreement to an Arbitration Clause Must Be "Knowing and Voluntary" Does Not Merit Review in This Case.

One of the Sixth Circuit's alternative reasons for holding the arbitration agreements in this case unenforceable was that the agreements did not reflect a knowing and voluntary waiver of the employees' constitutional right to a jury trial on

the claims at issue in the case. Ryan's contends that there is a conflict among the circuits over whether such a waiver of jury trial rights must be knowing and voluntary, but the cases it cites provide no support for this assertion.

Ryan's relies principally on a footnote in the Third Circuit's decision in *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175 (3d Cir. 1998), which it says rejected such a "heightened standard" for waiver. Pet. 5. The issue addressed in the *Seus* footnote, however, was not whether the waiver of Seventh Amendment jury rights in an arbitration agreement must be knowing and voluntary, but rather whether the waiver of *statutory rights* under Title VII must be knowing and voluntary. *Seus*, 146 F.3d at 183-84 n.2. Neither the *Seus* footnote nor any other part of the opinion addressed or even mentioned the standard for waiver of constitutional rights. The decision thus does not conflict with the Sixth Circuit's statements about waiver in this case.

Ryan's further asserts that the Eighth Circuit "appears to have" rejected the knowing and voluntary waiver standard in *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 838 (8th Cir. 1997). But *Patterson* "appears to have" done no such thing. None of the words "knowing," "voluntary," "waive," and "waiver" appears on the cited page in *Patterson* or, indeed, *anywhere* in the opinion. Nor is there any sign that the *Patterson* court considered, let alone decided, any question of waiver of constitutional rights. The issue in *Patterson* was whether Title VII rights could be vindicated through arbitration, not the standard for waiver of constitutional rights.

In short, the only two cases that Ryan's contends are in conflict with the decision below on the knowing and voluntary waiver point address issues different from the one discussed by the Sixth Circuit below.[2] There is no conflict

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[2] Similarly, the cases Ryan's cites as agreeing with the Sixth Circuit or reserving the issue also did not involve the question of waiver of the

(*Footnote continued*)

among the circuits. Beyond its erroneous assertion that there is such a conflict, Ryan's presents no argument to suggest that the Sixth Circuit's decision is incorrect or that the issue is otherwise important enough to merit review by this Court.

Moreover, the knowing and voluntary waiver issue is unnecessary to the resolution of this case. The Sixth Circuit's decision rested on a number of alternative grounds, the majority of which reflected generally applicable state-law contract doctrines that rendered the agreements here invalid or unenforceable. Specifically, the court held that the agreements lacked consideration and were therefore unenforceable under Tennessee law, *Walker*, 400 F.3d at 378-81; that they were not contracts under Tennessee law because they did not result from a meeting of the minds in mutual assent, *id.* at 383-84; and that they were unenforceable because structural flaws in the EDS arbitration system operated to prevent the employees from effectively vindicating their statutory rights. *Id.* at 385-88.

None of these alternative grounds depends in any way on the court's analysis of the knowing and voluntary waiver point. Moreover, because the waiver issue is a constitutional one, the Court would be obligated not to reach it if the Sixth Circuit's decision could be affirmed on any other basis. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 844 (1999). Thus, the waiver issue would only be before the Court if the Court were not only to address each of the Sixth Circuit's alternative holdings, but also reverse them. Because those alterna-

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constitutional right to a jury trial, but, like *Seus*, the distinct question of whether arbitration involves a waiver of substantive statutory rights under Title VII and, if so, whether such a waiver must be knowing and voluntary. *See Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 18-19 (1st Cir. 1999); *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 940 n.2 (4th Cir. 1999); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130 (7th Cir. 1997).